

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: February 3, 1997

TO : Curtis A. Wells, Regional Director  
Region 15

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Monroe Manufacturing 133-9300  
Case 15-CA-14061 512-5009-6733  
524-1717-5700

This case was submitted for advice as to whether the Employer's lawsuit against the Union and its agents for allegedly violating Section 301, RICO and other state and federal statutes is unlawful pursuant to Bill Johnson's Restaurants v. NLRB.<sup>1</sup>

### FACTS

In 1992, employees of Monroe Manufacturing ("Monroe" or "Employer"), a low-wage manufacturer of infants and children's products, voted in a Board election for a predecessor to Charging Party Union of Needletrades, Industrial & Textile Employees ("Unite" or "Union") to be their collective bargaining representative. The parties' relationship was marred by the Employer's unfair labor practices which prompted the Union to file dozens of Board charges against the Employer and its corporate predecessors, both prior to the successful election drive and during the subsequent three year period when the parties bargained for an initial contract. For instance,

In a 1991 decision, the Board held that the Employer unlawfully threatened employees with discharge, layoffs and/or plant closure; interrogated them; promulgated and enforced a discriminatory no-solicitation policy; solicited employees to withdraw Union authorization cards; and informed them that other employees had lost their jobs because of their

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<sup>1</sup> 461 U.S. 731 (1983). The propriety of relief under Section 10(j) will be addressed in a separate memorandum.

Union activities.<sup>2</sup> The Board further held that the Employer laid off two employees and discharged eight others because of their Union activity. The Fifth Circuit enforced the Board's decision in all respects, except as to allegations concerning one discharge and one layoff.

An ALJ held that the Employer violated Sections 8(a)(1), (3), (4), and (5) by interrogating and threatening employees; creating an impression of surveillance; unilaterally changing conditions of employment; promulgating and enforcing discriminatory work rules; issuing discriminatory warnings; and laying off, suspending, and discharging employees because of their Union activities and/or because they gave testimony at Board hearings.<sup>3</sup>

On August 18, 1995, the Employer entered into a formal Board settlement of fifteen unfair labor practice charges alleging that the Employer had refused to recognize and bargain with the Union, unilaterally altered working conditions, refused to furnish necessary information to the Union relevant to bargaining, discharged or suspended employees, and gave preferential treatment to non-union workers.<sup>4</sup>

In 1992 the Union began a "corporate campaign" against the Employer in reaction to the Employer's adverse bargaining positions and perceived unfair practices. Union agents contacted many of the Employer's customers in a partially successful attempt to dissuade them from dealing with the Employer. It also distributed and posted a multitude of leaflets in and around Monroe, Louisiana, alleging, among other things, that the Employer operated an unsafe facility, manufactured unsafe products, and treated

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<sup>2</sup> Mini-Togs, Inc., 304 NLRB 644 (1991), enf'd in part 980 F.2d 1027 (5th Cir. 1993).

<sup>3</sup> Monroe Manufacturing, Inc., JD-219-95; exceptions are currently pending before the Board.

<sup>4</sup> The Region had previously sought and was granted a Section 10(j) injunction which prohibited the Employer from engaging in the above-referenced activities.

its employees in an unfair manner. For instance, various handbills referred to the Employer's owners as "liars," "slum landlords," and sweatshop operators." The Union also accused the Employer of cheating on tax programs, harassing tenants, attempting to force an employee walkout, and manufacturing dangerous child care products.<sup>5</sup> The Region has not investigated the veracity of the Union's claims.

On August 14, 1995, more than three years after the Union was certified, the parties finally concluded an initial collective bargaining agreement. However, as set forth above, the Union continued to accuse the Employer of bargaining in bad faith and discriminating against Union employees. Thus, the Union kept up its corporate campaign.

On August 2, 1996, the Employer and its owners filed a lawsuit in federal district court for the Western District of Louisiana against UNITE, UNITE's Southwest Regional Joint Board, and eight named Union officials in their official capacities and as agents for UNITE. The Employer alleged in its 258-paragraph, eight-count complaint<sup>6</sup> that the defendants engaged in an unlawful campaign designed to force the Employer to accede to the Union's bargaining demands and to disrupt its business relationships with customers and employees in violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), the federal anti-extortion Hobbs Act, a Louisiana anti-extortion statute, and the Louisiana Racketeering Act. In general terms, the Employer substantively maintained that the Union (1) disseminated false statements and accusations to the public, customers, and employees; (2) caused and incited others to engage in acts of property damage, sabotage, harassment, violence, and threats of violence; and, (3) abused the legal process by filing baseless charges against the Employer containing willfully false statements before the NLRB, EEOC, and OSHA; filing

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<sup>5</sup> Regarding this latter allegation, the Monroe News-Star reported on August 16, 1994, that Monroe's owners had been indicted on federal criminal charges of distributing products that could endanger the lives of children. The outcome of this indictment is unknown.

<sup>6</sup> Hereinafter, the "Complaint."

baseless private lawsuits; attempting to cause the arrest of Employer officials; and interfering with the Employer's positions before state and local tax and zoning bodies. The Employer posits that the above conduct constituted predicate acts to the RICO violations, specifically mail and wire fraud as well as violations of the Hobbs Act, the Louisiana anti-extortion statute and the federal Travel Act. Regarding its allegation that Union agents filed "false unfair labor practice charges" containing "willfully false statements" in violation of the mail and wire fraud statutes, the Employer specifically enumerated over a dozen Board charges which resulted in either a formal Board settlement (containing, of course, an admission of culpability) or ALJ findings of violations which are currently before the Board on exception.<sup>7</sup> In addition, the Employer sought an injunction under LMRA §301, alleging that the Union breached the contractual grievance and arbitration provisions by filing unfair labor practice charges with the Board rather than submitting disputes to contractual grievance machinery. The Employer requested compensatory and punitive damages, as well as injunctive relief, attorney fees and court costs.

On November 15, 1996, the Union filed a motion for summary judgment, contending that the RICO counts did not adequately establish violations of the predicate acts and the existence of one of the two alleged RICO "enterprises." The Union further contended that this cause of action is barred by a private agreement between the parties in which the Employer agreed not to institute a RICO complaint and that the entire complaint is preempted by the NLRA's jurisdiction. The Court has not yet ruled on the Union's motion.

#### **ACTION**

We conclude that the Region should issue complaint, absent settlement, [FOIA Exemption 5  
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#### **1. The Bill Johnson's Standards**

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<sup>7</sup> See discussion of such charges, *supra*, at p. 2.

In Bill Johnson's Restaurants v. NLRB,<sup>8</sup> the Supreme Court held that the Board cannot halt the prosecution of a lawsuit unless two conditions are met: (1) the lawsuit lacks a reasonable basis in fact or law, and (2) the plaintiff filed the suit with a retaliatory motive. The Court explained in footnote 5, however, that the Board may enjoin suits that have "an objective that is illegal under federal law," or which are preempted by the Board's jurisdiction.<sup>9</sup> The Board has held that evidence of retaliatory motive underlying a lawsuit which attacks Section 7 activity consists of such factors as the baselessness of the lawsuit,<sup>10</sup> a request for damages in excess of mere compensatory damages,<sup>11</sup> and prior animus towards the defendant in the lawsuit.<sup>12</sup>

We conclude that the evidence herein is sufficient to establish a retaliatory objective for the lawsuit. The Employer's prior history of animus is legion.<sup>13</sup> Furthermore, the Employer seeks treble damages for the RICO violations, well above damages for merely compensatory losses.

As to baselessness, the Board is not permitted to usurp the traditional fact-finding function of the trial court and may not proceed with a charge if a lawsuit raises genuine issues of material fact, but should stay the unfair labor practice proceedings until the judicial action has been concluded.<sup>14</sup> The Supreme Court also suggested that, in

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<sup>8</sup> 461 U.S. 731 (1983).

<sup>9</sup> Id. at 737-38 n.5.

<sup>10</sup> Phoenix Newspapers, 294 NLRB 47, 49 (1989).

<sup>11</sup> Id.; H.W. Barss, 296 NLRB 1286, 1287 (1989).

<sup>12</sup> Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enf'd 934 F.2d 1288 (2d Cir. 1991), cert. den. 502 U.S. 1091 (1992).

<sup>13</sup> See the prior case history, *supra*, at p. 1.

<sup>14</sup> Bill Johnson's Restaurants, 461 U.S. at 745-46.

determining whether a suit has a reasonable basis, the Board may draw guidance from the standards used in ruling on motions for summary judgment and directed verdicts.<sup>15</sup>

## **B. The Employer's Lawsuit**

### **1. The RICO Counts<sup>16</sup>**

#### **a. Count II: The "Corporate Campaign Enterprise" Conducted its own Affairs through a Pattern of Racketeering Activity**

Pared down to its basics, Section 1962(c) makes it unlawful for (1) any person (2) associated with or employed by any enterprise to (3) conduct or participate in the conduct of such enterprise's affairs (4) through a pattern of racketeering activity.<sup>17</sup> An enterprise, for the purposes of this section, is a victim through which the RICO defendants (or "persons") conduct their pattern of racketeering.<sup>18</sup> Thus, the circuit courts, including the

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<sup>15</sup> Id. at 745 fn. 11. Under such analyses, the court presumes the facts alleged to be true and draws every reasonable inference from the allegations in the plaintiff's favor. See generally, Blum v. Morgan Guar. Trust Co., 709 F.2d 1463 (11th Cir. 1983); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Halet v. Wend Invest. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

<sup>16</sup> The Employer alleges four separate RICO counts under three distinct RICO causes of action, Sections 1962(b), (c), and (d). Since Count II involves the most useful analysis of RICO's "enterprise" element, we will analyze it first.

<sup>17</sup> Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

<sup>18</sup> See B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628, 633-34 (3d Cir. 1984), in which the court explained that Congress intended section 1962(c) to constitute a means to "punish criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances."

Fifth Circuit in which the instant matter arises, have almost unanimously concluded that a defendant cannot "victimize" itself; rather, "the violator of section 1962(c) who commits the pattern of predicate racketeering acts must be distinct from the enterprise whose affairs are thereby conducted."<sup>19</sup> The Fifth Circuit has held that this distinction also stems directly from the language of the statute itself, which applies only to a "person employed by or associated with any enterprise."<sup>20</sup> Thus, the court inferred that Congress necessarily intended that the RICO person be distinct from the enterprise.<sup>21</sup>

The enterprise need not be formally organized, like a corporation or a labor union, but rather can include any "group of individuals associated in fact although not a legal entity ...."<sup>22</sup> Since a plaintiff must prove the existence of an enterprise as well as a "pattern of racketeering activity" through which it engaged, the Supreme Court has stressed that an "association-in-fact" enterprise is "separate and apart from the pattern of

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<sup>19</sup> Old Time Enterprises v. International Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989), citing Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, 122-23 (5th Cir. 1986). See also Parker & Parsley Petroleum v. Dresser Industries, 972 F.2d 580, 583 (5th Cir. 1992); Atkinson v. Anadarko Bank and Trust Co., 808 F.2d 438, 439 (5th Cir. 1987), cert. den. 483 U.S. 1032 (1987). The Eleventh Circuit appears to be the lone holdout, concluding that there need not be a requisite distinctiveness between RICO defendant and enterprise for the purpose of section 1962(c). See United States v. Hartley, 678 F.2d 961, 989-90 (11th Cir. 1982). We note that corrupt organizations which conduct their own affairs by illegal means may, however, be liable under other sections of RICO; see *infra*.

<sup>20</sup> 18 U.S.C. §1962(c).

<sup>21</sup> Landry v. Air Line Pilots Ass'n, 901 F.2d 404, 425 (1990), cert. den. 498 U.S. 899 (1990).

<sup>22</sup> 18 U.S.C. §1961(4).

activity in which it engages."<sup>23</sup> This comports with Congress' intention not merely to reiterate then-existing sanctions for violating the underlying predicate acts (mail fraud, wire fraud, extortion), but to create new, more severe penalties designed to thwart the corruption of lawful organizations through unlawful means. Thus, the Fifth Circuit requires that an "association-in-fact" enterprise must have an existence "separate and apart from the actual pattern of racketeering ...."<sup>24</sup>

In this count, the Employer named Unite, its Regional Board, and eight named Union agents as RICO defendants which grouped together to form an "association-in-fact" enterprise in order to engage in a pattern of mail and wire fraud and extortion in violation of state and federal law. The Employer, however, failed to properly plead a RICO enterprise. First, as set forth above, the "corporate campaign enterprise," an association-in-fact, cannot be both the enterprise and a RICO defendant for the purpose of a section 1962(c) allegation. There is no requisite distinction between these two entities, because it is apparent that "you cannot associate with yourself."<sup>25</sup> Secondly, as set forth in the district court complaint, the Employer alleged that the association-in-fact exists solely "for the common and continuing unlawful and illegal purposes" described elsewhere in the complaint.<sup>26</sup> As set forth above, an association-in-fact cannot merely be the pattern of allegedly unlawful racketeering. In Landry v. Air Line Pilots Ass'n, the Fifth Circuit dismissed a RICO complaint against the defendant union because the plaintiff union member had failed to establish the existence of an enterprise (alleged to be the union together with its agent) separate from the allegedly fraudulent conduct in which it engaged (concluding an allegedly fraudulent

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<sup>23</sup> United States v. Turkette, 452 U.S. 576, 583 (1981).

<sup>24</sup> Parker & Parsley Petroleum, 972 F.2d at 583.

<sup>25</sup> McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985).

<sup>26</sup> Complaint, Paragraph 39.



collective bargaining agreement).<sup>27</sup> Thus, the court concluded that the enterprise is identical to its goals because, once it achieved its objective, it ceased to exist. The association-in-fact here, which comprises national union officers as well as agents specific to Monroe, Louisiana, will similarly cease to exist after it achieves the goals of the corporate campaign against the Employer. Furthermore, it too is defined solely in terms of its allegedly unlawful activity. Thus, insofar as the Employer has failed to allege a RICO proper enterprise, Count II of the complaint is baseless.

**b. Count I: Union Agents Conducted the Affairs of the "Union Enterprise" through a Pattern of Racketeering Activity**

In this count, the Employer alleged that eight named RICO defendants, all Union officers and agents, conducted the affairs of the "Union enterprise" (consisting of Unite and its Regional Board) through an unlawful pattern of racketeering activity. The Employer specifically alleged that the eight RICO defendants to this count violated federal mail and wire fraud statutes, extortion under federal and state law, as well as the federal Travel Act, which prohibits interstate travel and use of the mail, to engage in such specified unlawful acts as extortion under federal or state laws.<sup>28</sup> We conclude that some aspects of this count are baseless while others require further investigation before a determination can be made.

Each of the Union agents/defendants meet the definition of a RICO "person," which expressly encompasses individuals capable of holding a legal or beneficial

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<sup>27</sup> 901 F.2d at 433. Accord: Yellow Bus Lines, Inc. v. Local Union 639, 839 F.2d 782, 791 (D.C. Cir. 1988), vacated on other grounds 492 U.S. 914 (1989) (dismissing RICO lawsuit against union for damages suffered during a recognition strike; insufficient distinction between union as defendant and union acting together with its agents to form "association-in-fact" enterprise).

<sup>28</sup> 18 U.S.C. §1952.

interest in property.<sup>29</sup> Secondly, the Employer properly pled Unite and its Regional Board to be an "enterprise" through which the individual defendants allegedly engaged in a pattern of racketeering activity. Unlike the "corporate campaign enterprise" of Count II, above, the persons and the enterprise through which they act are not the same. Rather, the Union enterprise is allegedly the victim of, or vehicle through which, the various defendants engaged in the unlawful predicate acts. Thus, the requisite distinction between the RICO person and enterprise is maintained. Furthermore, Unite and its Regional Board exist apart from the alleged pattern of racketeering activity, inasmuch as the Union lawfully represents employees throughout the country apart from the campaign in Monroe. The Fifth Circuit in Landry v. Air Line Pilots Association overturned a district court's dismissal of an analogous RICO theory. Citing the explicit statutory definition of an enterprise as including unions, the court held that there is "no question" that ALPA, the union-defendant therein, could be an enterprise through which the defendants -- a union bargaining representative and an airline/employer -- allegedly defrauded the union's membership.<sup>30</sup>

Furthermore, we conclude that there is a reasonable basis for finding that the individual defendants committed a "pattern of racketeering activity." A "pattern of racketeering activity" constitutes at least two acts of "racketeering activity," as defined by Section 1961(1), within the last ten years.<sup>31</sup> In order to demonstrate a "pattern," a RICO plaintiff must show that the predicate acts are related, i.e. they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics ...."<sup>32</sup> Clearly, the allegedly fraudulent

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<sup>29</sup> 18 U.S.C. §1961(3).

<sup>30</sup> 901 F.2d at 434.

<sup>31</sup> 18 U.S.C. §1961(5).

<sup>32</sup> H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239-40 (1989).

and extortionate acts here are interrelated, in that they have a common purpose against an identifiable set of alleged victims. The final element of a "pattern of racketeering activity" is that there must be a threat of continued criminal activity.<sup>33</sup> The continuity may be "closed-ended" in that it involves a "closed period of repeated conduct," or "open-ended" involving "past conduct that by its nature projects into the future with a threat of repetition."<sup>34</sup> Here, the Employer alleged that the defendants engaged in a campaign to achieve specific results, i.e. to win a collective bargaining agreement and, later, adherence to the Union's interpretation thereof. The defendants' allegedly unlawful campaign "during a specific time period in pursuit of a specific goal"<sup>35</sup> is sufficient to establish that the pattern of acts was continuous.

However, in addition to the above, a RICO cause of action must be predicated upon violations of enumerated underlying state and federal laws. Here, the Employer alleged that the defendants engaged in the following violations of the predicate acts:

**i. Mail and Wire Fraud**

The crimes of mail and wire fraud are committed when the mail or electronic communications are used as part of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation or promises ...."<sup>36</sup> The requisite intent to defraud, however, is not defined by statute, but rather looks to alternate sources of law. According to the Landry court, "the intent to defraud is imputed to civil RICO defendants who act with reckless indifference to the truth

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<sup>33</sup> Id. at 239. See also Sedima, 473 U.S. at 496 n.14 (pattern of illegal activity must be marked by the factors of "continuity plus relationship").

<sup>34</sup> Id. at 241.

<sup>35</sup> Yellow Bus Lines, Inc. v. Local Union 639, 839 F.2d at 789.

<sup>36</sup> 18 U.S.C. §§1341 and 1343.

or falsity of their representations."<sup>37</sup> In effect, then, the Fifth Circuit has posited a standard strikingly similar to the traditional standard for libel in labor disputes set forth by the Supreme Court in Linn v. Plant Guard Workers,<sup>38</sup> i.e., statements made with knowledge or reckless disregard of their falsity.

For the purposes of this count, the Employer contends that the individual RICO defendants used the mail and wires in part to instigate "lawsuits, administrative complaints, and government investigations of Plaintiffs which are objectively and subjectively false"<sup>39</sup> before the NLRB, OSHA, and EEOC as well as various Louisiana state and local zoning and taxation bodies. The Employer specifically cites 31 "false" unfair labor practice charges which the defendants filed with the Board containing "willfully false statements and allegations."<sup>40</sup> Fourteen of these charges, however, are the subject of a formal Board settlement and an ALJ found six others to be meritorious. We conclude, therefore, that to this extent the allegations seek to relitigate meritorious Board charges, and that they harbor an unlawful objective within the meaning of footnote 5 to Bill Johnson's and can be enjoined immediately. Thus, by petitioning the court to consider whether charges upon which the Board or an ALJ has already ruled or which were formally settled, were filed with malicious intent, the Employer is seeking to relitigate them. Further, "where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the 'illegal objective' exception to Bill Johnson's."<sup>41</sup> By filing this aspect of the lawsuit, the

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<sup>37</sup> 901 F.2d at 429 n.87.

<sup>38</sup> 383 U.S. 53, 61, 65 (1966).

<sup>39</sup> Plaintiff's RICO Case Statement at 20 (hereinafter, "RICO Case Statement").

<sup>40</sup> Complaint, Paragraphs 102 and 105.

<sup>41</sup> Teamsters Local 776 (Rite Aid), 305 NLRB 832, 835 (1991), enf'd 973 F.2d 230 (3d Cir. 1992), cert. den. 507 U.S. 959 (1993).

Employer also violated Section 8(a)(4) because it thereby sought to restrain the RICO defendants from filing unfair labor practice charges with the Board.<sup>42</sup>

The remaining allegations regarding the alleged malicious prosecution of the non-meritorious Board charges, as well as claims filed with EEOC, OSHA, and the state court system, must be analyzed using a Linn malice standard.<sup>43</sup> Thus, the Region should investigate whether the individual defendants filed any of these charges or lawsuits with knowledge of their falsity or reckless disregard of the truth. In this regard, it is the plaintiff-Employer's burden to proffer the Board with some evidence, or evidence it reasonably expects to, and can only, obtain in discovery, that is sufficient to withstand a summary judgment/dismissal motion. If the Employer cannot produce any evidence in support of its claims that the Linn standard was met, then the allegation has "no reasonable basis" in law and can be enjoined pursuant to Bill Johnson's.<sup>44</sup> [FOIA Exemption 5

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The Employer further alleged that the individual RICO defendants "communicated false and misleading statements"<sup>45</sup> to its customers, the news media, and the general public charging that the Employer, among other things, violated numerous labor, consumer protection, and tax laws; harassed tenants; operated an unsafe working environment; and filed baseless lawsuits. There is no evidence, however, to

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<sup>42</sup> LP Enterprises, 314 NLRB 580 (1994).

<sup>43</sup> Ibid.

<sup>44</sup> [FOIA Exemption 5

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<sup>45</sup> Complaint, Paragraph 167.

establish whether the Union made these claims with malice under the Linn standard and, to avoid a finding of baselessness, the Employer must come forward with sufficient evidence to withstand a summary judgment/dismissal motion. [FOIA Exemption 5

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**ii. Federal and State Extortion**

The Employer alleged the individual RICO defendants committed a second predicate act, extortion in the form of threats to commit robbery, violence and destruction of property. According to the Employer, the defendants intended thereby to interfere with the Employer's business and other relationships and to induce the Employer to relinquish control over its policies and rights to direct its own business affairs.<sup>46</sup>

Extortion under the Hobbs Act<sup>47</sup> and Louisiana state law<sup>48</sup> are specifically incorporated in the list of RICO predicate acts. However, in U.S. v. Enmons,<sup>49</sup> the Supreme Court, quoting language from the Hobbs Act, held that the statute does not reach the "use of actual or threatened force, violence or fear" to secure legitimate union goals, such as higher wages. The decision turned on the Court's interpretation that Congress sought to criminalize only the "wrongful use of force," defined as the taking of property to which the defendant has no lawful claim. Since higher wages is a legitimate union objective, the Court concluded that there could be no "wrongful" taking thereof. Additionally, absent a clear expression of Congressional intent regarding the Hobbs Act, the Court voiced considerable reluctance to disturb the delicate balance of power between the federal government's traditional labor law enforcement functions and the states' criminal

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<sup>46</sup> Complaint, Paragraph 175 and RICO Case Statement at 26.

<sup>47</sup> 18 U.S.C. §1951.

<sup>48</sup> LA R.S. 14:66.

<sup>49</sup> 410 U.S. 396 (1973).

jurisdiction by placing the federal judiciary in the business of policing the orderly conduct of strikes.<sup>50</sup>

Here, the individual RICO defendants engaged in the allegedly extortionate conduct under this count, if they engaged in such conduct at all, in support of the Union's otherwise lawful statutory and contractual objectives. Thus, the Employer's Hobbs Act claim is not a proper RICO predicate, and is baseless.

This analysis has no application, however, to the allegations under the Louisiana extortion statute. Under Louisiana law, "[e]xtortion is the communication of threats to another with the intention thereby to obtain anything of value ..." which can include a "threat to do any unlawful injury to the person or property of the individual threatened ...."<sup>51</sup> Thus, under Louisiana law, extortion does not turn on the "wrongful" taking of property, as specified in the Hobbs Act. The Enmons Court's concerns about federalism also do not arise when applying state criminal law. Thus, we conclude that Enmons does not bar this predicate claim. Although the Employer's allegations that the individual Union defendants threatened and harassed Employer agents and employees in violation of state law, if true, might be sufficient to make out a claim, there is no record evidence or proffer of possible evidence supporting the Employer's claims. [FOIA Exemption 5

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### **iii. Travel Act**

The Employer further alleged that the defendants violated the federal Travel Act,<sup>52</sup> which prohibits persons from traveling across state lines or using the mail with the intent to promote any of the specified unlawful

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<sup>50</sup> Id. at 411, citing, *inter alia*, San Diego Trades Council v. Garmon, 359 U.S. 236, 247-48 (1959).

<sup>51</sup> LA R.S. 14:66.

<sup>52</sup> 18 U.S.C. §1952.

activities, including extortion under federal or state law. Thus, the merits of this aspect of Count I rise or fall with the merits of the Louisiana extortion allegations, since we have already concluded that the federal extortion allegation is baseless.<sup>53</sup> If those state extortion allegations are determined to be baseless pursuant to the analysis set forth above, then this Travel Act allegation of the count is also baseless and should be enjoined pursuant to Bill Johnson's.

**c. Count III: All Defendants "Acquired" the Employer as a Result of a Pattern of Racketeering Activity**

RICO Section 1962(b) prohibits a person from acquiring or maintaining any interest in or control over an enterprise through a pattern of racketeering activity. Under this count, the Employer alleged that the Union together with the eight named individuals engaged in a pattern of unlawful extortionate and fraudulent conduct (described above) in order to acquire or maintain an interest in the Employer itself. Thus, for the purposes of this count, the Employer posits itself as the "victimized" RICO enterprise.<sup>54</sup> The Employer, however, described the "interest" which the defendants acquired as "control over the affairs of the Plaintiffs' business enterprise," which caused the Employer to "cease doing substantial business with customers [and] to devote substantial personnel resources and huge sums of money to defending themselves" against the defendants' alleged violent activities,

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<sup>53</sup> Unlike the Hobbs Act, the fact that union leaders may have violated the Travel Act in pursuit of legitimate union goals does not exempt them from prosecution under this section. U.S. v. Thordarson, 646 F.2d 1323 (9th Cir. 1981), cert. den. 454 U.S. 1055 (1981).

<sup>54</sup> This is a proper manner of pleading a section 1962(b) allegation. See Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984) (under the respective subsections of §1962, "the enterprise may play the various roles of victim, prize, instrument or perpetrator.")



malicious prosecution, and campaign of fraud and misrepresentation.<sup>55</sup>

It is an open question in the Fifth Circuit as to whether the deprivation of a plaintiff's general right to run its enterprise free from coercion constitutes an acquisition of an "interest" in or "control" over that enterprise for the purposes of Section 1962(b). However, in Moffat Enterprises, Inc. v. Borden, Inc.,<sup>56</sup> the district court explained that,

it is clear that the "interest" contemplated in both § 1962(a) and 1962(b) is in the nature of a proprietary one, such as the acquisition of stock, and that the "control" contemplated is in the nature of the control one gains through the acquisition of sufficient stock to affect the composition of a board of directors.<sup>57</sup>

Thus, in Northeast Jet Center v. Lehigh-Northampton,<sup>58</sup> the district court dismissed a Section 1962(b) claim in which the plaintiff alleged that the defendants devised a fraudulent scheme designed to compel the plaintiff to sell some of its property at an undesirable price. The court concluded that such actions cannot amount to the acquisition of an "interest" in or "control" over the enterprise.

As set forth above, the Fifth Circuit has never spoken to this distinction. Thus, since there has been no Fifth Circuit ruling from which we can determine whether the Employer failed to state a legitimate cause of action by

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<sup>55</sup> RICO Case Statement at 42.

<sup>56</sup> 763 F.Supp. 143, 147-48 (W.D. Pa. 1990) ("normal contractual incidents of a typical distributorship agreement" is not "proprietary" interest relevant to section 1962(b)).

<sup>57</sup> Accord: Whaley v. Auto Club Insurance Ass'n, 891 F.Supp. 1237, 1241 (E.D. Mich. 1995).

<sup>58</sup> 767 F.Supp. 672, 683 (E.D. Pa. 1991).

properly pleading a §1962(b) violation in this determinative regard, we cannot say at this time that the Employer's pleading of this claim is baseless. Accordingly, since the predicate acts for this Count are the same as those set forth above, its baselessness rises and falls on the results of the subsequent investigation into the merits of the underlying predicate acts.

**d. Count IV: All Defendants Conspired to Violate Sections 1962(b) and (c)**

Section 1962(d) prohibits persons from conspiring to violate sections 1962(a), (b) or (c). Thus, the Fifth Circuit requires that the plaintiff specifically plead "an agreement to commit predicate acts."<sup>59</sup> We conclude that the Employer sufficiently pled an agreement by individual defendants in Count I, and the Union as well as the individual defendants in Count III, to violate Sections 1962(c) and (b), respectively.<sup>60</sup> Thus, the baselessness of this allegation depends upon the disposition of Counts I and III.

**2. Count V: Federal and State Extortion**

In addition to alleging violations of the Hobbs Act and the Louisiana extortion statute as predicates to a RICO violation, in this count the Employer seeks to sanction the defendants for violating the statutes in and of themselves. As set forth above,<sup>61</sup> the Hobbs Act allegation is baseless, while the state cause of action is dependent on the results of the subsequent investigation into the veracity of the Employer's substantive allegations.

**3. Counts VI and VII: Louisiana Racketeering Act**

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<sup>59</sup> Crowe v. Henry, 43 F.3d 198, 206 (1995).

<sup>60</sup> See RICO Case Statement at 44.

<sup>61</sup> See discussion, *supra*, beginning on p. 14.

The Employer further alleges in these counts that the defendants' allegedly extortionate and fraudulent conduct, as well as its alleged conspiracy to so act, constituted violations of the Louisiana Racketeering Act.<sup>62</sup> The state statute tracks RICO extremely closely; it includes mirror images of all of 18 U.S.C. section 1962. The Louisiana Supreme Court has acknowledged that since the state law "apparently was patterned after [RICO], federal decisions in this area are persuasive."<sup>63</sup> Accordingly, these counts are to be resolved consistently with the analysis regarding Counts I-IV, above.

#### 4. Count VIII: Section 301

The right to seek redress for statutory violations is basic to the purposes of the Act and is just as ardently guarded.<sup>64</sup> Although rights guaranteed under the Act may be waived, any waiver of a statutory right, either by contract or past practice, will not be lightly inferred and must be "clear and unmistakable."<sup>65</sup> A contractual waiver may be found where the language of the agreement is specific or where the bargaining history shows that the subject of the alleged waiver was fully discussed and "consciously yielded."<sup>66</sup>

The contractual grievance and arbitration provisions in this case simply created a mechanism to resolve

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<sup>62</sup> LA R.S. 15:1353.

<sup>63</sup> State v. Nine Savings Accounts, 553 So.2d 823, 825 (1989).

<sup>64</sup> Reno Hilton, 282 NLRB 819, 830 (1987) ("The Board is zealous in protecting employees' unhindered access to its processes.")

<sup>65</sup> Metropolitan Edison v. NLRB, 460 U.S. 693, 708 (1983).

<sup>66</sup> Proctor Mfg. Corp., 131 NLRB 1166, 1169-79 (1961); Southern Florida Hotel & Motel Ass'n, 245 NLRB 561, 567-68 (1979), enf. den. in part on other grounds 751 F.2d 1571 (11th Cir. 1985).

contractual disputes. The parties thereby did not indicate how they would litigate unfair labor practice allegations; the clauses do not even mention the parties' statutory obligations. Thus, there obviously is neither specific language in the contract nor bargaining history that clearly and unmistakably establishes that the Union agreed not to file unfair labor practice charges involving the Employer's statutory obligations and the employees' statutory rights.<sup>67</sup> Since the Union did not clearly and unequivocally waive its right under Section 10(a) to file unfair labor practice charges, the Employer's section 301 claim lacks a reasonable basis in law and, as set forth above, is retaliatory. Under these circumstances, this count is a coercive attempt to force the Union to refrain from filing any unfair labor practice charges over the Employer's unlawful conduct and, thus, is enjoined under the Bill Johnson's analysis.

## 5. Summary

In sum, we conclude that the Region should issue complaint, absent settlement, alleging that the Employer's lawsuit is: (1) baseless and retaliatory in violation of Section 8(a)(1) insofar as it alleges a Section 301 violation in Count VIII, a RICO violation in Count II, and violations of the Hobbs Act in Counts I-VII; and, (2) violative of Section 8(a)(4) and has an unlawful objective in violation of Section 8(a)(1) insofar as it alleges that the defendants engaged in malicious prosecution of litigated or formally settled NLRB charges in Counts I-IV and VI-VII. [FOIA Exemption 5

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<sup>67</sup> See Sheet Metal Workers Local 66 (Magnolia Contractors), 316 NLRB 294, 296 n.5 (1995), where the Board found no merit to the union's contention that the employer waived its right to file a Section 8(b)(4)(D) charge by agreeing to alternate procedures in their collective bargaining agreement to resolve jurisdictional disputes.

B.J.K.